ITR/331/1993 1/10 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 331 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GANESH CHHABABHAI FAMILY TRUST - Applicant(s)

Versus

COMMISSIONER OF INCOME-TAX - Respondent(s)

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Appearance :

MR.S.N.SOPARKAR, Sr. Advocate for MRS SWATI SOPARKAR for Assessee

MR MANISH R BHATT for Respondent

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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 2/08/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench "C" has referred the following two questions under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the assessee applicant.

> "[1] Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee trust was not a genuine trust and that assessment of the income in question was liable to be made in the status of A.O.P. And that maximum marginal rate was chargeable under Section 167-A?
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> [2] Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that in the alternative, the assessee – trust was a discretionary trust because of the fact that shares of ultimate and real beneficiaries were unknown or indeterminate and hence provisions of section 164 would be attracted and tax at maximum marginal rate would be chargeable?"

2. The assessment year is 1982-83 and the accounting period is the year ended on 30th June 1981. The assessee filed return declaring total income at Rs.Nil on 18th July 1984. Subsequently, the return was revised on 28th December 1984 declaring total

income at Rs.Nil, but the revised return was accompanied by a Note in Part III of the Return. It was stated that the assessee is a written specific trust wherein 45 persons in their capacities as trustees of 45 beneficiary trusts are beneficiaries. That all these 45 trusts have given intimation in writing through the respective trustees in terms of Section 160(1) Explanation 1 (iv) of the Act and hence, are written specific trusts. The respective shares of the beneficiaries are determinate and identifiable. That the 45 beneficiary trusts have not filed their returns of income because according to the information available with the assessee, the beneficiary trusts, at the relevant point of time, are having income much below the taxable limit.

3. The assessing officer called upon the settlor Smt. Surajben Chhababhai Patel to depose before him. He also examined Shri Indravadan S.Shah and Champaklal S.Shah, who had created 22 and 23 trusts respectively. Ultimately, the assessing officer came to the conclusion that the assessee trust was not a valid trust. As a consequence, he adopted the status of 12 persons named in paragraph No.11 of the assessment order, being the grand-children of the settlor, as an Association of Persons [AOP], because

according to him, the intention of the settlor was to settle the property for the benefit of the grand-children, and all other intermediary entities, namely, 45 trusts and 91 trusts were paper entities. The reason for adopting the status of AOP is that, according to the Assessing Officer, as per the trust deed dated 5-7-1979, the property settled upon the trust was not to revert to the settlor, but was required to be distributed amongst the aforesaid 12 persons equally; that the shares of 12 grand-children were indeterminate and unknown and hence, the income had to be taxed in the hands of such Association of Persons at the maximum marginal rate.

4. The assessee having failed before the Commissioner (Appeals), carried the matter in second appeal before the Tribunal. The Tribunal has taken note of the statement given by the settlor wherein the settlor has clearly stated that she had created the assessee trust for the benefit of 12 grand-children; that 45 trusts had been named as beneficiaries instead of 12 grand-children on the advice of her advocate. The Tribunal, after appreciating the evidence on record, came to the conclusion that “The persons carrying on business in question had created entities on paper with the help of some persons

close to them with the sole object of avoiding payment of tax.”. This finding was sought to be buttressed by referring to the income of the year and its distribution. Therefore, the Tribunal has come to the conclusion on facts after appreciating the evidence on record that, “when such a device is adopted, it could not be said that the trust which was created for carrying on business, was a genuine trust.”.

5. Mr.S.N.Soparkar, learned Sr. Advocate appearing on behalf of the applicant assessee made vehement submissions by inviting attention to various documents which form part of paper book before the Tribunal to submit that the finding recorded by the Tribunal regarding genuineness of the trust was not tenable. However, the Court is not inclined to enter into re-appreciation of the evidence for the purpose of determining whether such a finding on facts is required to be interfered with or not. Suffice it to state that, on going through the depositions of the settlor of the assessee trust and the settlors of the 45 beneficiary trusts, it is not possible to find any infirmity with the findings of fact recorded by the Tribunal. In the result, the finding of the Tribunal that the assessee trust was not a

genuine trust does not require to be interfered with.

6. However, coming to the second part of question No.1, namely, whether the income is liable to be assessed in the status of AOP, it is necessary to take note of the fact that the entire premise on which the assessing officer has proceeded and which finding has been confirmed by the Tribunal, is incorrect in law.

7. There is no finding recorded by any one that the 12 grand-children of the settlor had opted to join together for the purposes of conducting the business. Accepted position is that the business was conducted and the assessing officer has computed the income on the basis of net profit as per books maintained by the assessee.

8. In the case of Commissioner of Income Tax v. Indira Balkrishna, [1960] 39 ITR 546,

in almost a similar situation wherein three co-widows succeeded as co-heirs to the estate of their deceased husband, the stand of the department that they had to be assessed in the status of Association of Persons was turned down by the Apex Court by holding that the word “associate” means “to join in common purpose, or to join in common action”. Therefore, “Association of Persons” means an association in which two or more persons join in a common purpose or common action, and as the words occur in a charging section, the association must be one, the object of which is to produce income, profits or gains. That in absence of any finding that the grand-children had combined in a joint enterprise to produce income, and as they had done no act which had helped to produce the income, it could

not be held that they had the status of Association of Persons.

9. In these circumstances, the second part of question No.1 holding that assessment of income in question was liable to be made in the status of AOP at the maximum marginal rate chargeable under Section 167A of the Act, cannot be upheld.

10. Question No.1, therefore, is required to be answered in the affirmative in so far as the finding of the Tribunal that the assessee trust was not a genuine trust is concerned, while the latter half of the same question, namely, question No.1, regarding finding of the Tribunal that assessment of income in question was liable to be made in the status of AOP, and that maximum marginal rate was chargeable under Section 167A of the Act, is required to be answered in the

negative. In light of the answer to question No.1, it is not necessary to render any opinion as regards question No.2 and the said question is, therefore, left unanswered.

11. In light of the answer to the second part of question No.1, the Tribunal will be required to determine as to who is correct person in whose hands the income in question for the assessment year is liable to be taxed. It will be open for the Tribunal to take additional evidence on record, if necessary, or to restore the matter to the file of the assessing officer to pass an appropriate order.

12. The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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